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In The

Supreme Court of the United States

October Term, 1997

CITY OF FLORENCE; BOBBY JOE WINCE; THOMAS DUSING; JOHN DOLAN; RON KENNER, BOONE COUNTY SHERIFF; ROB REUTHE; AND CHRIS ALSIP,

Petitioners,

v.

WILLIAM CHIPMAN, ADMINISTRATOR OF THE ESTATE OF CONNI BLACK, AND SUSAN STEMLER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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STATEMENT OF THE CASE

Respondents' assertion that the Petitioners have misrepresented the record in this case compels a response. Respondents represent that the police officers in their individual capacities filed Motions for Summary Judgment, and that Order granting Summary Judgment on the grounds of qualified immunity was based upon FRCP 56 and not FRCP 12(b)(6). Respondents attach as an exhibit, the cover pages only of the Motions for Summary Judgment filed by the police officers. *As Respondents know, but failed to advise this Court, the Motions for Summary Judgment filed by the police officers were done so in their* ***official capacities*** *and pertained only to the issues of governmental liability – not to qualified immunity.* Had Respondents attached to their exhibit the supporting memorandum, this fact would have been evident.

The distinction between the Summary Judgment Motions and the Motions to Dismiss is important, as it governs the scope of review which should have been employed by the Sixth Circuit Court of Appeals. The District Court's ruling that the allegations in the Complaint did not overcome the individual officers' qualified immunity defense was issued in the Order entered pursuant to FRCP 12(b)(6) on August 2, 1994. Despite the fact that the qualified immunity issue was before the Sixth Circuit Court of Appeals on the grant of a FRCP 12(b)(6) Motion, the Court of Appeals exceeded its scope of review, looking beyond the Complaint, and accepted as "fact", the bare contentions made by counsel for Respondents in the appellate briefs and at oral argument. Thus, Respondents' assertion as to the procedural posture of

the qualified immunity issue, when ruled on by the Sixth Circuit, is erroneous.

ARGUMENT

THE SIXTH CIRCUIT'S ACKNOWLEDGMENT OF THE UNCERTAINTY OF THE CONTOURS OF SUBSTANTIVE DUE PROCESS EVIDENCES THE COMPELLING NEED FOR THE COURT TO RESOLVE THE SPLIT OF AUTHORITIES AMONG THE CIRCUITS AND TO PROVIDE GUIDANCE ON THE QUALIFIED IMMUNITY ISSUE

The Sixth Circuit itself has noted in the underlying opinion that the precise contours of substantive due process remain uncertain, unclear, and is even hotly debated both within this circuit and among the other circuits. Since the Supreme Court's holding in *DeShaney vs. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the circuits have struggled with defining how large a role the state must play in the alleged creation of danger to the plaintiff, and in the purported creation of the plaintiff's vulnerability, before the state has assumed a corresponding duty to protect. *See, e.g., Freeman vs. Ferguson*, 911 F.2d 52 (CA 8 1990).

Conflict and confusion abound in this area even within the Sixth Circuit itself. In *Foy vs. City of Berea*, 58 F.3d 227 (CA 6 1995), a different panel applied *DeShaney, supra*, to facts which were very similar to those in the case at bar, and found an opposite result – namely, that the officers were entitled to qualified immunity. The panel in the case at bar, ignored the underpinnings of the *Foy* case,

and by reaching an opposite result and redefining the concepts of qualified immunity and custody, created further conflict and confusion in an area of law which is already ambiguous.

In the Brief in Opposition to the Petition for Writ of Certiorari, Respondents assert that "in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and ultimately governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." Petitioners would agree with this assertion. Neither the Respondents, nor the Sixth Circuit, however, can point with any specificity to the existence of legal precedent which would have provided the police officers in this action with "fair warning" that their actions and/or inactions toward Conni Black were violative of her constitutional rights.

The only legal justification to deny the police officers qualified immunity given by the Sixth Circuit, and echoed by the Respondents in their brief, is the contention that the officers should have known that their actions were violative of the "heartland of the constitutional guarantee as was understood at the time of the violation". And yet, since *DeShaney, supra,* there has never been any consensus among the circuits as to the parameters of substantive due process in the context of claims brought by plaintiffs alleging that the government official allowed them to suffer indirect harm. *See, e.g., McComb vs. Wambaugh,* 934 F.2d 474 (CA 3 1991); *Harris vs. District of Columbia,* 932 F.2d 10 (D.C. Cir. 1991); *Hilliard vs. City and County of Denver,* 930 F.2d 1516 (CA 10 1991); *McKee vs.*

City of Rockwell, 877 F.2d 409 (CA 5 1989); *Walton vs. City of Southfield*, 995 F.2d 1331 (CA 6 1993); *Foy vs. City of Berea*, 58 F.3d 227 (CA 6 1995); *Wood vs. Ostrander*, 879 F.2d 583 (CA 9 1989). Quite simply in the area of substantive due process, the very "heartland" itself continues to be debated among the circuits.

By denying qualified immunity to the police officers in the case at bar, while at the same time acknowledging the uncertainty of the law, the Sixth Circuit has rendered meaningless the directive espoused in *Harlow vs. Fitzgerald* that, in all motive-based claims, qualified immunity exists unless the official's conduct violated *clearly established law*. 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Where previously a qualified immunity analysis of clearly established law focused upon established precedent of the United States Supreme Court, the United States Courts of Appeals, or the highest State Appellate Court, the Sixth Circuit's approach now bypasses this relatively objective inquiry, and substitutes in its place a hindsight analysis which imputes to the government official an artificial knowledge that his actions violated an alleged "heartland" of the plaintiff's constitutional guarantee. Furthermore, government officials, in this case police officers, are charged with having knowledge of this "heartland" of substantive due process even though it is an area of law which is hotly debated among constitutional scholars and jurists. The Sixth Circuit's decision destroys the very purpose of qualified immunity of shielding the discretionary decision-making activities of government officials, and in fact, deprives government officials of the "fair warning" enunciated in Respondent's brief.

CERTIORARI REVIEW IS WARRANTED TO PREVENT 42 USC 1983 FROM BECOMING A VEHICLE FOR CLAIMS SEEKING REDRESS FOR ALLEGED CONDUCT WHICH IS ESSENTIALLY TORTIOUS IN CHARACTER, AS OPPOSED TO BEING UNCONSTITUTIONAL

Despite the admonition by the Supreme Court that the Fourteenth Amendment is not to be used as a vehicle to create a system of federalized tort law, the circuits remain split as to the state of mind necessary to establish "deliberate indifference" in the context of an alleged substantive due process claim. In this case, the Sixth Circuit has now chosen to follow the lead of some of the more liberal circuits, in substituting "deliberate indifference" with a "known or should have known" standard.

Contrary to Respondent's assertions otherwise, Petitioners have not "blatantly misrepresented" the Sixth Circuit's deliberate indifference standard of culpability. The Sixth Circuit's standard is set forth in its opinion which states that the officers *knew or should have reasonably known that Kritis was unfit to drive. They knew or reasonably should have known that Kritis had assaulted her earlier in the evening.*

The *"knew or reasonably should have known"* creates a duty to protect based upon ordinary negligence, and is a far cry from previous Supreme Court precedent which defines "deliberate indifference" as requiring an actual "showing that the official was **subjectively** aware of the risk". *Farmer vs. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Under *Farmer vs. Brennan, supra,* the Supreme Court stated that "deliberate indifference

describes a state of mind more blameworthy than negligence . . . " *Id.* The Sixth Circuit's definition plainly and undeniably runs counter to this pronouncement.

Respondents argue that in *Board of County Commissioners of Bryan County, Oklahoma vs. Brown,* 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) the Supreme Court adopted the "knew or should have known" standard in defining deliberate indifference. A review of this opinion, however, shows just the opposite. In *Brown,* the Supreme Court stated:

> As our decision in *Canton* makes clear, "deliberate indifference" is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.

117 S.Ct. at 1391.

Significantly, the *Brown* Court also noted that a showing of simple or *even heightened negligence* is insufficient to establish deliberate indifference. *Id.* 117 S.Ct. at 1389.

Respondents' quote from the *Brown* case was taken from that portion of the opinion which referenced a municipality's liability for deprivation of civil rights arising from an unconstitutional practice or custom. Where a plaintiff can show *a pattern of conduct* leading to constitutional violations, the *Brown* Court noted that "Their [the municipal decision-makers] continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action – the "deliberate indifference" – necessary to trigger municipal liability." *Brown,* 117 S.Ct. at 1390.

It is clear that the Supreme Court in *Brown* reaffirmed the tenet expressed in previous holdings that the parameters of substantive due process claims remain restrictive so as to prevent the Fourteenth Amendment from becoming a "font" of tort law in the federal courts. Respondents are unable to reconcile the Sixth Circuit's definition of deliberate indifference with the established precedent of the Supreme Court, and instead have proffered a "smoke and mirrors" argument that Petitioners misrepresented the Sixth Circuit's own language. Ironically in so doing, Respondents themselves have misrepresented the Supreme Court's definition of deliberate indifference given in *Board of County Commissioners of Bryan County, Oklahoma vs. Brown*, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). Certiorari review should be granted to clarify the definition of deliberate indifference in the context of claims brought under the Fourteenth Amendment, and to prevent further confusion among the circuit courts of appeals.

CONCLUSION

Respondents have offered no reasons for denial of this Petition for Writ of Certiorari, but instead have chosen to merely recite isolated portions of the Sixth Circuit's opinion. Respondents do not dispute Petitioners' presentation of the conflicts among the circuits with respect to substantive due process claims; nor do Respondents dispute the conflicts existing within the Sixth Circuit, itself. That is perhaps because the uncertainty and ambiguity of the law, and the existing inconsistent holdings among the circuits are readily acknowledged by this Sixth Circuit

panel. This case provides an appropriate vehicle for the Supreme Court to provide much needed guidance to the circuit courts of appeals on those questions left unanswered under *DeShaney vs. Winnebago County Social Services*, while at the same time, clarify the proper scope of qualified immunity in the context of substantive due process claims. Consequently, Petitioners respectfully request the Supreme Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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